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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

JOHN B. CUNDIFF and BARBARA C. CUNDIFF, husband and wife; ELIZABETH NASH, a married woman dealing with her separate property; KENNETH PAGE and KATHRYN PAGE, as Trustee of the Kenneth Page and Catherine Page Trust,

Plaintiffs,

v.

DONALD COX and CATHERINE COX, husband and wife, et al., et ux.,

Defendants.

P1302
Case No. CV 2003-0399

Division No. 4

REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION IN LIMINE RE: ROBERT CONLIN

(Assigned to the Hon. Kenton Jones)

(Oral argument requested)

Defendants, by and through undersigned counsel, hereby file their Reply to Plaintiffs' Response to Defendants' move *in limine* to preclude Plaintiffs from calling Robert Conlin as a witness for purposes of providing interpretation of the subject Declaration of Restrictions and to preclude admission of his affidavit. As it turns out and unbeknownst to Defendants, Mr. Conlin has passed away. Accordingly, we would agree that the aspects of Defendants' Motion that pertains to Mr. Conlin testifying and Defendants' objection thereto to be moot. However, as to Plaintiffs'

opposition to Defendants' Motion as it pertains to Mr. Conlin's affidavit, we believe that their contention that because the Court of Appeals thought two aspects of Mr. Conlin's affidavit, namely on the issue of the rural nature of the subject subdivision and the intent to preclude business activities, to be relevant, does not make the entirety of his affidavit admissible. Rather, Mr. Conlin's affidavit constitutes inadmissable hearsay and because he cannot be cross-examined concerning his affidavit, it, without more, may not be considered by the trier of fact in this case. This Reply is supported by the accompanying Memorandum of Points and Authorities and the record on file.

MEMORANDUM OF POINTS AND AUTHORITIES

The sole argument supporting Plaintiffs' Response to Defendants' Motion seeking preclusion of Mr. Conlin's affidavit is that the Court of Appeals thought two aspects of that affidavit to be admissible – namely, Mr. Conlin's alleged statement that the affidavit indicates that the subject subdivision was intended to be a rural and a residential subdivision. In this regard, the Court of appeals commented only on one paragraph, specifically paragraph 4, of Mr. Conlin's affidavit when it quoted from paragraph 4 stating that the subject Declaration of Restrictions ensures "not only a rural setting, but a 'rural, residential' environment." See Court of Appeals Memorandum Decision attached to Plaintiffs' Response at p. 11. However, the Court of Appeals made no other comments about any other aspect of Mr. Conlin's affidavit and the Court of Appeals did not discuss in any way paragraph 5 of Mr. Conlin's affidavit in which he purports to add restrictions to the subject Declaration of Restrictions that do not exist anywhere within the four corners of that instrument. Accordingly, we fail to see how it can be said that the Court of Appeals has set the law of the case where Mr. Conlin's affidavit is concerned outside of the limited language relied upon by it.

There is no question that Mr. Conlin's affidavit constitutes parol evidence. Herein, Plaintiffs seek to use Mr. Conlin's affidavit at paragraph 5 to supplant, vary and contradict the plain meaning of the terms "trade", "business", "commercial", and "industrial enterprise" contained within the subject Declaration of Restrictions with less restrictive language allowing property owners to conduct and operate home-based businesses, using their property as storage yards for their business and commercial business enterprises or to advertise their home based business and commercial enterprises being operated therein or thereon.

However, admission of such affidavits is prohibited by the law in Arizona. As the Court has been advised in Defendants' Motion, principles of contract interpretation apply to real property restrictions. *See e.g., State v. Mabery Ranch, Co.*, 216 Ariz. 233, ¶ 28, 165 P.3d 211, 219 (App.2007) (applying rules of contract interpretation to easement agreement). The parol evidence rule prohibits the admission of extrinsic evidence to vary or contradict the terms of a contract, although such evidence is admissible to interpret them. *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993). A court must consider the evidence, but need admit it only when the contract language is "reasonably susceptible" to the interpretation offered by the proponent, and then only to determine the parties' intended meaning. *Id.* at 154, 854 P.2d at 1140. "When 'the provisions of the contract are plain and unambiguous upon their face, they must be applied as written, and the court will not pervert or do violence to the language used, or expand it beyond its plain and ordinary meaning or add something to the contract which the parties have not put there.'" *Employers Mut. Cas. Co. v. DGG & CAR*, Inc., 218 Ariz. 262, ¶ 24, 183 P.3d 513, 518 (2008), *quoting D.M.A.F.B. Fed. Credit Union v. Employers Mut. Liab. Ins. Co. of Wis.*, 96 Ariz. 399, 403, 396 P.2d 20, 23 (1964).

In considering the foregoing and Defendants' request for exclusion of Mr. Conlin's affidavit, the 2011 decision in *IB Property Holdings, LLC v. Rancho Del Mar Apartments Ltd. Partnership*, 228 Ariz. 61, 263 P.3d 69 (Ct.App. 2011), is instructive and directly on point. *Rancho* involved a dispute about an easement among owners of a three-phase apartment complex. *Id.* at 228 Ariz. at 63, 263 P.3d at 71. The easement in dispute in *Rancho* stated specifically as follows:

> Grantor hereby grants and conveys to Grantee and its successors and assigns a [ ] pedestrian and passenger vehicle easement over entranceways and vehicle driveways located on Phase I ... as they may exist from time to time, for the purposes of providing pedestrian ingress and egress and passenger vehicle ingress and egress to and from Phase II–III, all as hereinafter limited.

Id. at 228 Ariz. at 67, 263 P.3d at 75 (emphasis added). The two owners of the general partner for the Defendant/Appellant offered affidavits as evidence that provided that "when the easement was granted the parties intended that, if an access point was constructed from the [subject apartment] complex to [a public street called] Bilby Road, access would be blocked by a locked gate and be limited to emergency vehicle use only...." *Id.* Defendant/Appellant also contended that additional language of the easement provided for restricted use of the easement. *Id.* That language provided: "[i]t is the intention of the parties that they grant each other reciprocal easements for the sole purpose of limited ingress and egress upon the terms, provisions, conditions, and covenants contained in th[e] agreement." *Id.* Relying on the foregoing provision, Defendant/Appellant contended that the scope of the easement was reasonably susceptible to the interpretation it offered because the easement was intended to be "limited," and that limitation was for emergency vehicle access only. *Id.*

In finding the affidavits of the owners of the Defendant's/Appellant's inadmissible parol evidence, the Court ruled as follows:

> The parol evidence rule renders inadmissible the evidence Rancho offers because it is offered solely to vary or contradict the plain meaning of the easement, not to interpret one of its terms. The proffered evidence merely seeks to supplant the terms "pedestrian" and "passenger vehicle" with the term "emergency vehicle." Although we first must consider Case and Breen's affidavits and their "allegations made ... as to the appropriate interpretation of the [easement] in light of the extrinsic evidence" offered, we also must consider the language of the writing to determine if it is reasonably susceptible to the suggested interpretation. The only argument Rancho offers indicating the easement's language suggests it is reasonably susceptible to another meaning is the provision of the easement stating it is for "limited ingress and egress." However, the limitation referred to is clear—the easement is limited by "the terms, provisions, conditions, and covenants contained in th[e] agreement," none of which limit the easement to emergency vehicle use only. And Rancho has offered no explanation why a reciprocal easement that permitted access to emergency vehicles only would have been either necessary or desired by RTC.
>
> Here, no interpretation of the easement is required because the meaning of its terms is clear. Even in light of the evidence Rancho proffered, the contract language is not "reasonably susceptible" to the interpretation it offered. Thus the evidence cannot be admitted to determine the parties' intended meaning. Moreover, "one cannot claim that one is 'interpreting' a written clause with extrinsic evidence if the resulting 'interpretation' unavoidably changes the meaning of the writing." And although Rancho contends the trial court "could not resist the temptation to interpret the language in the Easement according to how it understood the words," the words "pedestrian" and "passenger vehicle" require no interpretation. "At what point [the court] stops 'listening to testimony that white is black and that a dollar is fifty cents is a matter for sound judicial discretion and common sense.'" Therefore, the court did not err in refusing to admit the proffered extrinsic evidence and in concluding the parties "would be bound by the written agreement."

Id. at *Rancho*, 228 Ariz. at 67-68, 263 P.3d at 75-76 *citing Taylor*, 175 Ariz. at 152-53, 854 P.2d at 1138-39, *Long v. City of Glendale*, 208 Ariz. 319, ¶¶ 28-29 and 34, 93 P.3d 519, 528 (App.2004), *quoting* 6 Arthur L. Corbin, Corbin on Contracts § 579, at 127 (interim ed.2002).

Herein, the language of paragraph 2 of the Declaration of Restrictions is clear and unambiguous and it prohibits ***all*** "trade", "business", "commercial", and "industrial enterprise" activities without limitation. Nothing about the foregoing language "requires interpretation"; nor is the foregoing language "reasonably susceptible" to the interpretation offered by Plaintiffs through

the use of Mr. Conlin's affidavit; to the contrary, the language is global in nature and covers all types of "trade", "business", "commercial", and "industrial enterprise" activities regardless of their nature or type, whether large or small. And the Declaration most certainly does not state anything about allowing any particular type of "trade", "business", "commercial", and "industrial enterprise" to the exclusion of any others; nor does it allow the use of the properties in the subdivision as a storage facility for a "trade", "business", "commercial", and "industrial enterprise" regardless of its shape or form and whether operated on, in or out of the properties in the subdivision or at any other location.

Put simply, Plaintiffs' effort to use Mr. Conlin's affidavit, as parol evidence, is virtually identical to the effort to use the affidavits sought to be admitted in *Rancho*. Plaintiffs seek to "vary or contradict" the "plain meaning" of paragraph 2 of the Declaration, "not to interpret [] its terms." *Rancho*, 228 Ariz. at 67, 263 P.3d at 75 (emphasis added). Rather, Plaintiffs seek to "supplant" paragraph 2 of the Declaration which states "No trade, business, profession or any other type of commercial or industrial activity shall be initiated or maintained within said property or any portion thereof" with the phrase "No trade, business, profession or any other type of commercial or industrial activity shall be initiated or maintained within said property or any portion thereof with the exception of home based business and property owners shall be allowed to use their properties as storage yards for any trade, business, commercial or business enterprises they so wish to operate be it at, on or in their properties" of something of the like, which would be tantamount to a complete re-write of the restriction itself, which this Court cannot allow through parol evidence.

On the subject of parol evidence, the law is clear. "When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate

integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing." *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 854 P.2d 1134 (1993) remand on other grounds, 182 Ariz. 39, 893 P.2d 39 (Ct.App. 1994), vacated on other grounds, 185 Ariz. 174, 913 P.2d 1092 (1996) *citing* 3 Arthur L. Corbin, Corbin on Contracts § 573, at 357 (1960) and *Rental Dev. Corp. v. Rubenstein Const. Co.*, 96 Ariz. 133, 136, 393 P.2d 144, 146 (1964). The subject Declaration of Restrictions constitutes a contract between Plaintiffs and Defendants and the Court is required to give effect to the language of the instrument itself. *Scalia v. Green*, 229 Ariz. 100, 271 P.3d 479 (Ct.App. 2011) *citing Spurlock v. Santa Fe Pac. R.R. Co.*, 143 Ariz. 469, 474, 694 P.2d 299, 304 (App.1984); *see also, Powell v. Washburn*, 211 Ariz. 553, 556–57, ¶ 13, 125 P.3d 373, 377 (2006). The Declaration is not ambiguous merely because Plaintiffs wish for it to have more or less meaning than the language used by its drafter. *Triangle Construction v. City of Phoenix*, 149 Ariz. 486, 720 P.2d 87 (App.1985); *Autonumerics, Inc. v. Bayer Industries, Inc.*, 144 Ariz. 181, 696 P.2d 1330 (App.1984). Rather, it must be construed from its express language as set forth within the four corners of the instrument. *McCutchin v. SCA Services of Arizona, Inc.*, 147 Ariz. 234, 709 P.2d 591 (App.1985); *Cecil Lawter Real Estate School, Inc. v. Town & Country Shopping Center Co., Ltd.*, 143 Ariz. 527, 694 P.2d 815 (App.1984). And given that Plaintiffs have not alleged that the Declaration was created through fraud, misrepresentation or mistake or that it is ambiguous, the intent of the parties must be discerned from the four corners of the document. *Id.* at *Scalia citing Spurlock; see also, Isaak v. Massachusetts Indem. Life Ins. Co.*, 127 Ariz. 581, 584, 623 P.2d 11, 14 (1981) *citing Standage Ventures, Inc. v. State*, 114 Ariz. 480, 562 P.2d 360 (1977); *Brand v.*

Elledge, 101 Ariz. 352, 419 P.2d 531 (1966); and *LeBaron v. Crismon*, 100 Ariz. 206, 412 P.2d 705 (1966).

Based upon the foregoing, this Court should let the Declaration of Restrictions speak for themselves and the Court should preclude the admission of those portions of Mr. Conlin's affidavit used to modify, change or alter the express language chosen when the Declaration was created. This should especially be the case since Mr. Conlin will not be available to testify and subject to cross-examination. Accordingly, this Court must preclude admission of Mr. Conlin's affidavit as evidence in this case.

Respectfully submitted this 28 day of December, 2012.

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